



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25 2011

Ms. Teresa J. Brown
Senior Open Records Assistant
Plano Police Department
P.O. Box 860358
Plano, Texas 75086-0358

OR2011-04098

Dear Ms. Brown:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 414768 (ORR# GONR012511).

The Plano Police Department (the "department") received a request for all information pertaining to a named individual. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, such as section 261.201(a) of the Family Code. Section 261.201 provides, in pertinent part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert the submitted information is confidential under section 261.201 of the Family Code because the report documents a referral made to Child Protective Services ("CPS"). However, although a referral was made to CPS, you have not demonstrated how this information constitutes a report of alleged or suspected child abuse or neglect or that it was used or developed in an investigation under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of chapter 261 of the Family Code). We, therefore, conclude section 261.201 is not applicable to the investigation at issue and the department may not withhold any portion of the submitted information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007 of the Family Code. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. § 58.007(c). For purposes of section 58.007(c), "child" means a person who is ten years of age or older and under seventeen years of age. *See id.* § 51.02(2). The information at issue involves juvenile delinquent conduct that occurred after September 1, 1997. *See id.* § 51.03 (defining "delinquent conduct" for purposes of Fam. Code § 58.007). It does not

appear that any of the exceptions in section 58.007 apply. Therefore, we find the submitted information is confidential under section 58.007(c) of the Family Code.

We note, however, the requestor is an investigator with the United States Investigations Services ("USIS") and requests the information at issue as part of a background investigation for a national security or public trust employment position. We also note USIS is under contract to perform investigations on behalf of the United States Office of Personnel Management ("OPM"). OPM is authorized to perform background investigations of prospective federal employees to ensure applicants have not broken the law or engaged in other conduct making them ineligible for federal employment. *See Mittleman v. Office of Pers. Mgmt.*, 76 F.3d 1240, 1243 (D.C. Cir. 1996); *see also* 5 U.S.C. §§ 3301 (president may prescribe regulations for admission of individuals into civil service), 1304 (investigations conducted by OPM), 1104 (president may delegate personnel management functions to OPM); 5 C.F.R. pts. 731, 732, 736 (authorizing OPM to investigate applicants for federal employment). OPM is subject to Executive Order Number 10, 450, which provides, "[t]he appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation." Exec. Order No. 10, 450, § 3, 18 Fed. Reg. 2489 (Apr. 27, 1953), reprinted as amended in 5 U.S.C. § 7311 (2000). While the scope of the investigation depends on the relation of the employment to national security, "in no event shall the investigation include less than a national agency check (including a check for the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies[.]" *Id.* OPM has a right to the criminal history record information ("CHRI") of state and local criminal justice agencies when its investigation is conducted with the consent of the individual being investigated. *See* 5 U.S.C. § 9101(b)(1), (c). Furthermore, where USIS conducts an investigation on behalf of OPM, USIS is authorized to receive CHRI. 20 Op. Off. Legal Counsel 299 (1996). CHRI is defined as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correction supervision and release[.]" but does not include "identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system" or "records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality." 5 U.S.C. § 9101(a)(2).

The requestor has submitted written consent from the individual under investigation for the release of that individual's CHRI. Furthermore, federal law provides OPM's right of access to CHRI preempts state confidentiality provisions. *Id.* § 9101(b)(4) (section 9101 "shall apply notwithstanding any other provision of law . . . of any State"). Thus, we conclude, where a requestor seeks information as part of an investigation conducted on behalf of OPM, the requestor has a right of access to CHRI held by the department regarding the individual under investigation. In addition, we conclude such a right of access under federal law preempts the state confidentiality provision you claim. *See English v. General Elec. Co.*, 496

U.S. 72, 79 (1990) (noting state law is preempted to extent it actually conflicts with federal law); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). As stated above, the submitted information is subject to section 58.007(c) of the Family Code. However, the information at issue contains CHRI of the individual under investigation by USIS. Therefore, to the extent the requestor seeks the information at issue as part of an investigation conducted on behalf of OPM, the department must release the CHRI relating to the individual under investigation to the requestor. The remainder of the information must be withheld under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. If the requestor is not seeking the information on behalf of OPM, the entirety of the submitted information is confidential under section 58.007(c) of the Family Code and must be withheld under section 552.101 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tf

Ref: ID# 414768

Enc. Submitted documents

c: Requestor
(w/o enclosures)